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Nos. 04-1034, 04-1384

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In The
Supreme Court of the United States

JOHN A. RAPANOS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

–and–

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA SUPPORTING PETITIONERS

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TABLE OF CONTENTS

		Page
I.	Interest of the *Amicus Curiae*	1
II.	Summary of the Argument	2
III.	Argument	3
	A. Affordable Housing Is Becoming an Acute Issue in Arizona	8
	B. Implementation of the Tributary Rule by the United States by the Corps of Engineers Demonstrates the Impact of Federal Regulation on Local Land Use Planning	11
	C. The Reach of the Federal CWA Should be Limited to Matters within the Proper Ambit of the Commerce Clause	15
	D. The Tributary Rule Impermissibly Continues to Regulate All Tributaries, Regardless of Their Relationship to Downstream Navigable Waters	21
IV.	Conclusion	23

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468 (1963) 6

Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005) 5

Carabell v. United States Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004) 4, 5, 19, 20

Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000) 7

Defenders of Wildlife v. Flowers, 414 F.3d 1066 (9th Cir. 2005) 13

Defenders of Wildlife v. Flowers, 2003 WL 22145716 (D. Ariz. August 18, 2003) 13

Headwaters v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001) 5, 21

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30 (1994) 11

In re Needham, 354 F.3d 340 (5th Cir. 2003) 22

Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) 16

Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113 (9th Cir. 2005) 7

Solid Waste Agency of Northern Cook County v. United States Corps of Engineers, 531 U.S. 159 (2001) ..... *passim*

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) 5, 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Morrison, 529 U.S. 598 (2000)..... 15, 20

United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002)..... 19, 20, 23

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003)..... 20

United States v. Rapanos, 376 F.2d 629 (6th Cir. 2004)..... 4, 20

STATUTES

16 U.S.C. § 1531..... 7

33 U.S.C. § 1251(b)..... 11, 18

33 U.S.C. § 1342..... 4

33 U.S.C. § 1344..... 4

33 U.S.C. § 1362(7)..... 3

42 U.S.C. § 4321..... 7

ARIZ. REV. STAT. ANN. § 41-3953(A)..... 8

Ariz. REV. STAT. ANN. § 41-3954(A)..... 8

ARIZ. REV. STAT. ANN. § 41-3954(B)(1)..... 8

ARIZ. SESS. LAWS Ch. 22, §§ 18, 22..... 8

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387..... 3

OTHER AUTHORITIES

37 Fed. Reg. 18289 (Sept. 9, 1972)..... 16

38 Fed. Reg. 13528, 13529 (May 22, 1973)..... 16

39 Fed. Reg. 12115 (April 3, 1974)..... 16

TABLE OF AUTHORITIES – Continued

Page

40 Fed. Reg. 19766 (May 6, 1975) 16

40 Fed. Reg. 31320, 31323-24 (July 25, 1975) 17

40 Fed. Reg. 19767 17

42 Fed. Reg. 37122, 37144 (July 19, 1977) 6

43 Fed. Reg. 37078 (August 21, 1978) 17, 18

44 Fed. Reg. 32854, 32901 (June 7, 1979) 18

Administrative Appeal Decision, *Approved Geographic Jurisdiction for the Valley Vista Property*, p. 2, Los Angeles District, File number 2002-01321-SDM (January 31, 2003) 13

Approved Jurisdictional Determination for the Sunrise Office Park, p. 3 (September 7, 2001) 12

Arizona Affordable Housing Profile, Findings and Conclusions (2002) 8

EPA General Counsel Opinion (Feb. 6, 1973) 15

Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila Confluence, Arizona Navigable Stream Adjudication Commission No. 03-005-NAV (Sept. 21, 2005) 6

The State of Housing in Arizona (2000) 9, 10

COURT RULES

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

S. Rept. No. 92-1236 at 144 15

REGULATIONS

33 C.F.R. § 328.3(a)(4), (5) and (7) 3
33 C.F.R. § 328.3(a)(5) 3, 5
33 C.F.R. § 328.3(a)(7) 3
33 C.F.R. § 331.7(g) 12
33 C.F.R. § 323.3(a)(5) 18
33 C.F.R. Part 331 12
40 C.F.R. § 230.10(a) 7
40 C.F.R. § 230.10(d) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8, cl. 3 14

BRIEF *AMICUS CURIAE* OF HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA

I. INTEREST OF THE *AMICUS CURIAE*[1]

The Home Builders Association of Central Arizona (HBACA) is a non-profit corporation organized in 1951 under the laws of the State of Arizona to provide a means for businesses in the housing and real estate industries in central Arizona to address issues and concerns relating to those industries. Under its association with the National Home Builders Association, HBACA is authorized to represent constituent members in the Arizona counties of Maricopa, Pinal, Apache, Navajo, Gila, Graham, Greenlee, Cochise, Yavapai, Yuma and La Paz. These counties represent a vast territory in Arizona, with very diverse hydrogeology, topography, natural and man-made drainage, and with a very rapidly expanding population.

Defining "navigable waters" across this diverse and mostly arid region affects many aspects of the home building industry. Land development in Arizona often involves crossing small natural drainages and rerouting

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[1] Pursuant to Rule 37.3(a), Rules of the Supreme Court, *amicus curiae* Home Builders Association of Central Arizona states that letters of consent have been obtained from the United States of America and Petitioners in both cases. The consent of the United States of America is filed herewith. The consent of Petitioner Carabell is filed herewith. Consent from the Petitioner Rapanos is already on file with the Clerk.

Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amicus curiae* Home Builders Association of Central Arizona state that they authored this brief in whole; no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution for preparation or submission of this brief.

man-made irrigation canals. Thus, an overly expansive definition of navigable waters has a direct and immediate impact on site preparation – the very foundation of new home construction.

HBACA is also interested in the social policy of affordable housing in Arizona. Too often, when regulatory policies affecting growth and development are being implemented at the federal level, the impact on locally affordable housing is overlooked. Policy-level decision-makers within most governmental agencies are not typically affected by lack of affordable housing in places like Arizona, yet their policy decisions directly affect our costs. HBACA is close to the issue of affordability at the retail homebuyer level, and is therefore in a unique position to comment on the true cost of these regulatory programs.

II. SUMMARY OF THE ARGUMENT

The United States Army Corps of Engineers defines "navigable waters" under the Clean Water Act to include all tributaries, and tributaries of tributaries, of traditionally navigable waters, up to the ordinary high water mark of any such tributary. In Arizona, this results in federal land use regulation at the micro level, dictating alternatives and mitigation requirements not only under the Clean Water Act, but also under the National Environmental Policy Act and the Endangered Species Act.

Once within jurisdiction, federal regulation spreads beyond just the impact on the "navigable water" and includes all of the land within the proposed development project. This type of federal regulation exacerbates an already acute crisis in affordable housing in Arizona.

This type of federal regulation also extends beyond Congress' intent in creating the Clean Water Act, which expressly protects the rights of States to control local land use planning decisions. Like the migratory bird rule that this Court invalidated in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001), the regulation of tributaries in this fashion exceeds the authority granted under the Clean Water Act.

We urge the Court to reverse the decision in these two consolidated cases and set forth guidelines that will enforce the requirement of a significant federal nexus between navigable-in-fact waters and their tributaries.

III. ARGUMENT

Any law that affects the cost of housing in Arizona affects HBACA. The definition of "navigable waters" at issue in these two consolidated cases is such a law.

The Clean Water Act (CWA)[2] establishes two regulatory permitting programs for discharges to "navigable waters."[3] Section 404 requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the U.S. Army Corps of Engineers (Corps), with oversight by the U.S. Environmental Protection Agency

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[2] Also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

[3] The term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), which is in turn defined by regulation to include not only all traditional navigable waters, but also all "impoundments of water otherwise defined as waters of the United States" and "[t]ributaries of waters" of the United States and "wetlands adjacent to waters" of the United States. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(4), (5) and (7).

(EPA).[4] Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, requires a permit for discharge of pollutants (other than dredged or fill material) into navigable waters and is administered by EPA.[5]

The two cases at issue here, *Rapanos v. United States*, Cause No. 04-1034,[6] and *Carabell v. United States Army Corps of Engineers*, Cause No. 04-1384,[7] involve the extent of federal CWA jurisdiction over the use of fill material on private lands that contain waters that may, or may not, be classified as navigable waters within the meaning of the CWA. They both turn on the reach of federal authority over so-called adjacent wetlands – that is, wetlands that are adjacent to navigable waters but which are not, themselves, navigable waters. In this inquiry, the Court of Appeals for the Sixth Circuit noted:

> What is required for CWA jurisdiction over "adjacent waters," however, is a significant nexus between the wetlands and 'navigable waters' which can be satisfied by the presence of a hydrological connection.[8]

Apparently, however, not even a "hydrological connection" is required in some cases. For example, the Court of Appeals for the Ninth Circuit has recently held:

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[4] 33 U.S.C. § 1344 (herein referred to as "§ 404").

[5] 33 U.S.C. § 1342.

[6] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004).

[7] *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

[8] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004) (citations omitted).

> The Corps' jurisdiction over wetlands falling within the adjacency clause in 33 C.F.R. § 328.3(a)(7) does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States.[9]

Thus, despite the fact that the *Baccarat* court emphasized that it was joining the reasoning of the Sixth Circuit in *Carabell*, it held that mere adjacency of the wetland to a navigable water establishes the federal nexus, and therefore the existence of federal jurisdiction over the private property at issue.[10]

Of course, the wetlands at issue in these cases are seldom adjacent to navigable waters in the traditional sense. Instead, they are usually adjacent to a drainage ditch, which may flow into another ditch, and perhaps another, before reaching a small stream which eventually empties into a body of water that is traditionally "navigable." This particular reach of federal jurisdiction stems not from adjacency, but from the upstream application of the so-called "tributary rule." 33 C.F.R. § 328.3(a)(5).[11]

In Arizona, the tributary rule is the most expansive part of the current regulatory definition. As implemented by the Corps, it means that every tributary of a traditional navigable water is in itself a "navigable water" under the CWA. Therefore, waters of the United States include not

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[9] *Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*, 425 F.3d 1150, 1158 (9th Cir. 2005).

[10] *Id.* at 1157.

[11] *See United States v. Deaton*, 332 F.3d 698, 705 (4th Cir. 2003); *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001).

just direct (or primary) tributaries but all secondary, tertiary and higher order tributaries to the highest headwater limit of the tributary system.[12]

The sole traditional navigable water in Arizona is the Colorado River.[13] Because of the tributary rule, however, even the driest ephemeral drainages and remote stock tanks are considered "navigable waters" because they have the potential to drain into larger washes that eventually may drain into intermittent streams that eventually may drain into the Colorado. These higher order "tributaries" are small arroyos that may not see water for years and may be tens or even hundreds of miles from the nearest "wet" water. These are not adjacent wetlands. They are in fact dry lands that are adjacent to more dry lands that may eventually drain ephemeral storm runoff into a tributary of a true navigable water.

In Arizona, land and site development often involves construction of road and utility crossings over these small washes, and the relocation of old irrigation canals or stock tanks. Because the Corps and EPA consider these "navigable waters," the reshaping or crossing typically results in discharges of fill material requiring a permit under Section 404 of the CWA.

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[12] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[13] Almost the entire State of Arizona lies within the Colorado River Basin. *See Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963). Arizona's second most productive river, the Salt River portion of the Gila River system, has been declared non-navigable in fact in the Phoenix metropolitan area by the Arizona Navigable Stream Adjudication Commission. *See Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila Confluence*, Arizona Navigable Stream Adjudication Commission No. 03-005-NAV (Sept. 21, 2005).

The Section 404 permit process imposes substantial burdens. Under EPA Guidelines, all discharges to waters of the United States must be avoided to the extent practicable.[14] Discharges that are permitted must be mitigated by appropriate and practical steps to "minimize potential adverse impacts of the discharge on the aquatic ecosystem."[15] Considering that there are no "aquatic ecosystems" to impact, regulation of these dry areas defies the logic of a federal hydrologic or aquatic nexus to interstate commerce.

Not only is the permit process itself expensive and time consuming, the fact that a federal permit is required triggers additional regulatory requirements under the National Environmental Policy Act (NEPA)[16] and the Endangered Species Act (ESA).[17] As discussed later in this brief, the assertion of jurisdiction over these small washes, stock tanks and ditches raises significant constitutional and federalism concerns. To put the matter in context, however, it is helpful first to look at the housing situation in Arizona and its relationship to the private land base.

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[14] 40 C.F.R. § 230.10(a).

[15] *Id.* at § 230.10(d).

[16] 42 U.S.C. §§ 4321 *et seq.* *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (real estate development in northeast Phoenix enjoined based on Corps' alleged violation of NEPA in issuing a § 404 permit for road and utility line crossings).

[17] 16 U.S.C. §§ 1531 *et seq.* *See Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000) (suit to enjoin construction of high school on grounds that it would result in possible take of cactus ferruginous pygmy-owl).

A. Affordable Housing Is Becoming an Acute Issue in Arizona

In Arizona, the question of affordable housing has raised sufficient concern at the state level to create the Arizona Department of Housing[18] and the Arizona Housing Commission.[19] Jointly, these entities have undertaken to study affordable housing issues in Arizona and prepare a report on the subject. The report, entitled *Affordable Housing Profile*, studies the affordable housing "gap" between Arizona households seeking housing and the number of available units.[20] It describes this concept as follows:

> One of the primary objectives of this study is to identify the "affordability gap" for the State. The "gap" is the difference between the number of households within each income range and the number of housing units affordable to those households. It typically occurs at the lower end of

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[18] The Arizona Department of Housing was created in 2001 and became operational on October 1, 2002. 2001 ARIZ. SESS. LAWS Ch. 22, §§ 18, 22. It is an agency of the State of Arizona, authorized by statute to "address the affordable housing issues confronting this state. . . ." ARIZ. REV. STAT. ANN. § 41-3953(A) (2003). The agency's official website is http://www.housingaz.com.

[19] The Arizona Housing Commission is an advisory commission also created by Arizona to "recommend housing strategic planning and policy." ARIZ. REV. STAT. ANN. § 41-3954(B)(1). The members include rural and non-rural representatives, one member of a tribal government, one member of a tribal housing department, and various other interests groups. *See id.*, § 41-3954(A).

[20] Arizona Housing Commission, Arizona Department of Housing, *Arizona Affordable Housing Profile, Findings and Conclusions* (2002). The report is available on the Arizona Department of Housing website. http://www.housingaz.com/hc/default.asp. The report notes "Arizona is the first state to commission a profile of this kind." *Id.* at i.

> the income range where there are more households than affordable units. For these households to find housing in the community, they must pay more than 28% of their income toward shelter or live in substandard and/or over-crowded conditions.[21]

The report states that, as of 2000, the total affordability gap for the State of Arizona "is estimated at 194,700 households or about 10.3 percent of all households including those on Native American reservations. . . . [C]ertain counties, such as Coconino, Santa Cruz and Yavapai, have affordability gaps higher than 15%."[22]

Importantly, the report also concludes:

> Each community's housing needs are different and individual solutions and strategies must be tailored to the particular situation.[23]

This element of affordable housing – local community differences and the need for local solutions – relates directly to the need for clarification of federal regulatory control over land use planning at the local level.

In examining the cost of housing in Arizona, the Arizona Housing Commission also prepared a report entitled *The State of Housing in Arizona*.[24] This report focuses on the reasons for high housing costs and the concomitant lack of affordable housing. It identifies six

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[21] *Id.* at 1.

[22] *Id.*

[23] *Id.* at 2.

[24] Arizona Housing Commission, *The State of Housing in Arizona* (2000). This report is available on the State of Arizona Department of Housing web page, http://www.housingaz.com/hc/default.asp.

factors contributing to the price of a home: Construction material and labor (50-55%); land acquisition and site improvement costs, including infrastructure (20-24%), builder overhead (12-14%), government fees (including the cost of regulations) (8-10%), builder profit (3-5%), and city, county and state sales taxes (3%).[25]

Significantly, "the most frequently mentioned barrier to affordability within the construction process was the limited amount of land for private development."[26] The Report notes that, while almost half of the land in the State of California is privately held, only 17% of the land in Arizona is in private hands. The remainder is in public ownership.[27] As to this issue of lack of land, the report concludes that the influence of government on this barrier to housing affordability is "pervasive," ranging from public land policies and open space requirements to zoning and taxation.[28]

In Arizona, pervasive restrictions on the use of private land to protect "aquatic ecosystems" in dry washes translate into increased housing costs and more limits on available land. The nature and extent of these types of land use restrictions, and the balance between them and housing affordability, are issues of unique local concern.

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[25] *Id.* at 32-33.

[26] *Id.* at 37.

[27] Of Arizona's total land base, 27% is held in Indian reservation status. The Federal Government owns an additional 42%, which is variously administered by the Bureau of Land Management, the Bureau of Reclamation, the Nation Park Service, the National Forest Service and other federal agencies. Finally, the State of Arizona owns 14% of the total land base. *Id.* at 18.

[28] *Id.* at 37.

The difficulties experienced in attempting to comply with federal land use policies at the local level demonstrates the wisdom of Congress, expressed in 33 U.S.C. § 1251(b)[29] to limit the reach of federal land use planning to issues of truly national concern.

B. Implementation of the Tributary Rule by the United States by the Corps of Engineers Demonstrates the Impact of Federal Regulation on Local Land Use Planning

As stated in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[30] regulation of land use is a function traditionally performed by local governments. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.[31] Interpretation of the CWA should preserve the ability to deal with issues of local concern at the state and community level and thus avoid "the significant constitutional and federalism questions" raised by federal jurisdiction over an entire project

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[29] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, ***to plan the development and use (including restoration, preservation and enhancement) of land and water resources***, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b) (emphasis added).

[30] 531 U.S. 159, 174 (2001).

[31] *Id., quoting in part from Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994).

by virtue of an ephemeral wash, stock tank or irrigation ditch that happens to cross the property.

But the balance has shifted in Arizona. Federal jurisdiction, based on the application of the tributary rule, is indeed "pervasive." For example, the Administrative appeal decisions of the Corps of Engineers South Pacific Division, which includes Arizona, illustrate the broad jurisdictional reach of the term "navigable waters" as currently applied in Arizona.[32]

In one such case, the Corps assumed jurisdiction over a desert wash across private property in Tucson based on the wash's connection, through a series of downstream but apparently unnamed washes, to the Santa Cruz River, which is tributary to the Gila River, which is in turn tributary to the navigable Colorado River over 200 miles away. The jurisdictional delineation included a one-foot wide man-made channel.[33]

Another case involved a remote stock tank. In Arizona, stock tanks are typically constructed in low areas of natural drainage to capture runoff for cattle watering purposes. As such, they are "impoundments" of a tributary of a navigable water, making the tank itself, under current Corps policy, a navigable water regulated under the CWA, even if the hydraulic connection to downstream waterways

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[32] The appeals are conducted pursuant to 33 C.F.R. Part 331. These decisions are published at the Corps South Pacific Division website at http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/admin/Appeals/index.htm. The decisions themselves do not have precedential effect and are being cited here only for illustrative purposes. 33 C.F.R. § 331.7(g).

[33] *Approved Jurisdictional Determination for the Sunrise Office Park*, p. 3 (September 7, 2001).

was thereby severed. In this example, the Corps asserted jurisdiction over a stock tank based on a historic tributary connection that "disappeared sometime after 1952."[34]

Once under the jurisdiction of the CWA, modification of these dry washes and stock tanks for land development also requires administrative compliance with NEPA and ESA. For example, in *Defenders of Wildlife v. Flowers*, 414 F.3d 1066 (9th Cir. 2005) (petition for rehearing pending), a private real estate development became embroiled in an ESA dispute because the landowner sought a § 404 permit to impact 0.78 acres of a desert wash for road and utility line crossings.[35] Despite the small impact on the washes themselves, the United States Fish and Wildlife Service maintained that "the total impact of the development which would be authorized by your agency [the Corps] should be assessed" and that "the footprint of the project to be permitted by your agency extends beyond the limits of jurisdictional waters and is, at minimum, the total 440 acres of development."[36] Thus, for 0.78 acres of impact to

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[34] "The District stated as clarifying information at the appeal conference that they considered T-Bone Tank and Wash 1 as within CWA jurisdiction because of an historical tributary connection from Wash 1 to Scatter Wash, about 2 miles south of the site, that existed prior to 1952. The District stated that this connection would have had an OHWM [Ordinary High Water Mark] prior to 1952. The District further stated that this tributary connection with an OHWM between T-Bone Tank and Scatter Wash disappeared some time after 1952." Administrative Appeal Decision, *Approved Geographic Jurisdiction for the Valley Vista Property*, p. 2, Los Angeles District, File number 2002-01321-SDM (January 31, 2003).

[35] The precise facts of the case are set forth in more detail in the unpublished decision of the district court, *Defenders of Wildlife v. Flowers*, 2003 WL 22145716 (D. Ariz. August 18, 2003).

[36] *Id.* at *4.

dry washes over 150 miles from the Colorado River, the entire development was subject to intensive regulation under the ESA.[37]

Nor are these cases isolated instances. Because so much land in Arizona has these small washes, federal permits under § 404 of the CWA are frequently required. If then subjected to consultation under § 7 of the ESA, the landowner can be regulated to the point of requiring new residents to maintain their pets on leashes.[38]

These cases illustrate the impact of finding navigable waters in the arid "dry-lands" of Arizona. The result is federally mandated land use planning in areas outside the traditional reach of the Commerce Clause of the United States Constitution.[39] This federal role should be limited by more clearly articulated standards on the federal "nexus" required to assert jurisdiction under the Commerce Clause.

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[37] The Corps had issued a "no effect" determination on the impact to the cactus ferruginous pygmy-owl based on the fact that no pygmy-owls had been found to live within the project area and that the critical habitat designation, which had once applied, had been vacated by the district court and affirmed on appeal. 414 F.3d at 1070.

[38] The biological opinions issued in response to § 404 permit applications in Arizona may be found on the Arizona Ecological Services Office website under the Document Library tab, http://arizona es.fws.gov. The reference made here is to the opinion issued for a mixed-use development in Marana, Arizona dated July 9, 2003, at p. 5.

[39] U.S. CONST., Art. I, § 8, cl. 3.

C. The Reach of the Federal CWA Should be Limited to Matters within the Proper Ambit of the Commerce Clause

As noted in *United States v. Morrison*, 529 U.S. 598, 617-18 (2000), "[t]he Constitution requires a distinction between what is truly national and what is truly local." These words speak well to the issue of defining "waters of the United States" in terms that extend the reach of the federal permitting programs under the CWA. Permitting at the federal level is cumbersome, expensive and time consuming. It is necessary when national issues are at stake, but it is inappropriate when federal permitting requirements operate to displace local authority, and responsibility, for insuring the local welfare.

Soon after the adoption of the CWA in 1972, EPA began developing regulations to define "waters of the United States." EPA's General Counsel viewed the deletion of the word "navigable" from the definition of "waters of the United States" as "significant":

> The [legislative history] indicates that the new definition of "navigable waters" is to "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[40]

Counsel then opined on the types of waters that would be regulated, and included both navigable waters and tributaries of navigable waters in the list.[41] Later that

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[40] EPA General Counsel Opinion (Feb. 6, 1973), *quoting* S. Rept. No. 92-1236 at 144.

[41] *Id.*

same year, EPA issued its regulations defining "waters of the United States" and, in apparent reliance on the counsel opinion, included "[t]ributaries of navigable waters of the United States" as a category of jurisdictional waters.[42]

In its initial rulemakings, the Corps defined "navigable waters of the United States" in its regulations without reference to tributaries.[43] The 1974 revisions to the definition of "navigable waters" more fully addressed the CWA amendments, but still made no reference to tributaries.[44] This interpretation was challenged in *Natural Resources Defense Council v. Callaway* (*NRDC*),[45] where the court held that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the term "navigable waters" was "not limited to the traditional tests of navigability."[46] The court therefore held that the Corps' limited exercise of jurisdiction over tributaries was unlawful.

Within weeks of the *NRDC* decision, the Corps proposed regulations on how to define "waters of the United States."[47] The Corps proposed two basic alternatives for regulating tributaries. The first would regulate "all navigable waters up to their headwaters and all tributaries of navigable waters up to their headwaters." The second, less expansive definition (and the one favored by the Corps)

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[42] 38 Fed. Reg. 13528, 13529 (May 22, 1973).

[43] *See* 37 Fed. Reg. 18289 (Sept. 9, 1972).

[44] 39 Fed. Reg. 12115 (April 3, 1974).

[45] 392 F. Supp. 685 (D.D.C. 1975).

[46] 392 F. Supp at 686.

[47] 40 Fed. Reg. 19766 (May 6, 1975).

would regulate all navigable waters up to their headwaters and all "primary" tributaries of such waters up to their headwaters.[48]

By July of 1975, however, the Corps' published "interim final regulations" that selected the broadest possible regulatory approach to tributaries. In this rule, navigable waters were defined to include "[a]ll tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark."[49] The preamble stated that "[w]ith respect to the inland areas of the country, Corps jurisdiction under Section 404 of the [CWA] would extend to . . . all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States." The Corps' 1977 final regulations modified this definition of tributaries to exclude the headwater requirement.[50]

In 1978, EPA published proposed revisions to its definition of waters of the United States that would have broadened the 1973 definition to include additional waters.[51] The change was proposed "to more accurately reflect which waters are subject to the requirements of the [CWA]. Consistent with legislative history, judicial interpretations, and longstanding EPA policy, the term covers all waters which may be regulated by the Federal Government within

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[48] 40 Fed. Reg. at 19767.

[49] 40 Fed. Reg. 31320, 31323-24 (July 25, 1975).

[50] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[51] 43 Fed. Reg. 37078 (August 21, 1978).

constitutional limits. . . . "[52] In 1982, the Corps regulations were brought in line with EPA's.[53]

Thus, prior to *SWANCC, supra*, the general view of EPA and the Corps regarding the scope of their jurisdiction under the CWA was that, by leaving out the word "navigable," Congress intended to regulate all waters that could be reached through Congress' plenary authority over interstate commerce. This view was unequivocally rejected by this Court in *SWANCC*: "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. . . . The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[54]

Yet, as demonstrated by the two consolidated cases currently before the Court, the tributary rule continues to rest on the faulty presumption of this expansive jurisdiction, notwithstanding Congress' explicit recognition of the rights of States in 33 U.S.C. § 1251(b) of the CWA.

In these consolidated cases, the United States Army Corps of Engineers has asserted, and the Court of Appeals for the Sixth Circuit has affirmed, jurisdiction over wetlands on private property because the wetlands are adjacent to

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[52] *Id.* at 37079. *See also* 44 Fed. Reg. 32854, 32901 (June 7, 1979) (revised definition).

[53] 33 C.F.R. § 323.3(a)(5) (1982).

[54] 531 U.S. at 172.

drainage ditches that are deemed, by virtue of the tributary rule, to be navigable waters.

In *Carabell*, the court noted:

> [T]he unnamed ditch running along the hypotenuse of the Carabells' triangle-shaped property is separated from wetlands only by a man-made berm or barrier. At its northeastern end, the ditch is connected to the Sutherland-Oemig Drain, a drain that empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. At its southwestern end, the ditch is connected to other ditches, which – like the Sutherland-Oemig Drain – outlet into the Auvase Creek and eventually into Lake St. Clair. The ditch, then, is connected on either end to tributaries of "waters of the United States" as defined in the regulations.[55]

In *Rapanos*, the district court had originally noted, in reference to the Salzburg site:

> The government argues that Defendant's wetlands had a "surface hydrological connection" to a ditch dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay. The nearest body of navigable water to Defendant's property is the Kawkawlin River. . . . Thus, the nearest body of

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[55] 391 F.3d at 708.

> navigable water to Defendant's property is roughly twenty linear miles away.[56]

The Court of Appeals affirmed jurisdiction under the CWA in both instances on the principle that the "hydrological connection" provided a "significant nexus" between the wetlands and the tributaries to navigable waters.[57]

Importantly, the Court of Appeals acknowledged in its reasoning:

> Since *SWANCC* this court has noted:
>
> * * *
>
> There is also a nexus between a navigable waterway and its nonnavigable tributaries. . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted.[58]

This hard and fast rule should not pass constitutional scrutiny under *Morrison* or *SWANCC* because it knows no bounds between issues of national or local concern. For the reasons discussed in the next section, the rule adopted by the Court of Appeals for the Sixth Circuit is legally erroneous should be reversed. A more moderate approach to federal land use control should be adopted.

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[56] *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1014-15 (E.D. Mich. 2002).

[57] *See Rapanos*, 376 F.3d at 642; *Carabell*, 391 F.3d at 710.

[58] *Carabell*, 391 F.3d at 709-710, *quoting from United States v. Rapanos*, 339 F.3d 447, 452 (6th Cir. 2003).

D. The Tributary Rule Impermissibly Continues to Regulate All Tributaries, Regardless of Their Relationship to Downstream Navigable Waters.

The blanket nature of the current tributary rule mirrors the now-discarded migratory bird rule at issue in *SWANCC*.[59] Like the migratory bird rule, the tributary rule was developed as a way to broadly identify any and all waters that Congress could conceivably regulate under its interstate commerce authority, regardless of navigability. Like the migratory bird rule, the tributary rule reaches too far.

First, there is no definition of "tributary" in the rules. Courts have been left to develop their own *ad hoc* definitions or defer to the Corps' judgment. *See Headwaters, Inc. v. Talent Irrigation Dist, supra* (quoting the dictionary definition of tributary as "a stream which contributes its flow to a larger stream or other body of water.").[60] *See also United States v. Deaton, supra* ("We conclude that the regulation is ambiguous on the question of how far the coverage of tributaries extends. We therefore turn to the agency's interpretation. . . . In short, the word 'tributaries' in the regulation means what the Corps says it means.").[61]

Headwaters and *Deaton* both proceed from the assumption that blanket regulation of tributaries is constitutionally permissible. Yet the assumption itself – that all tributaries of navigable waters, no matter how far removed, and no matter how limited the hydraulic connection, can be

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[59] 531 U.S. 163-164 (discussion of migratory bird rule).

[60] 243 F.3d at 533.

[61] 332 F.2d at 710-11.

regulated – does not pass the "significant nexus" test of *SWANCC*.

Rather, the reasoning of the Court of Appeals for the Fifth Circuit in *In re Needham*, 354 F.3d 340 (5th Cir. 2003) is more in line with the reasoning of *SWANCC*. There, the court held:

> [I]n this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."[62]

We know from experience in Arizona that the reach of the CWA, in the agency view, extends to the smallest ephemeral washes, stock tanks and roadside ditches, regardless of the extent of hydrologic or ecological connection to navigable waters or aquatic ecosystems. The effect of the tributary rule, as implemented in Arizona, is to control land use planning at the federal level by not only regulating any modification of these small ephemeral drainages, stock tanks or irrigation ditches, but also by dictating alternatives and mitigation requirements for the entire development. Such regulation is not consistent with Congressional intent, as directly expressed in the CWA, and runs afoul of constitutional limitations on federal authority under the Commerce Clause.

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[62] 354 F.3d at 345-46.

IV. CONCLUSION

If "navigable waters" can be defined so broadly as to include wetlands adjacent to a drainage ditch that is "roughly twenty miles" from the nearest navigable river,[63] virtually every parcel of private land in the State of Arizona will be classified as subject to jurisdiction under the CWA because it has a wash, stock tank or irrigation ditch that is "tributary" to the Colorado River. This rule results in federal regulation of land use planning at the micro level that is unnecessary and inconsistent with the limitations Congress intended on the CWA, as emphasized by this Court in the *SWANCC* decision.

The over regulation of land use by the federal agencies is having a direct impact on the affordability of housing in Arizona, where only 17% of the State's land base is in private ownership. On behalf of the home building industry in Arizona, HBACA asks this Court to reverse the decision of the Court of Appeals for the Sixth Circuit in these two consolidated cases and establish better guidelines for a determination of the "significant federal nexus" between navigable-in-fact waters and their tributaries.

Respectfully submitted this 2nd day of December, 2005

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[63] *United States v. Rapanos*, *supra*, 190 F. Supp. at 1012.